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No. 09-793

In The
Supreme Court of the United States

CHERYL JANKY,

Petitioner,

v.

LAKE COUNTY CONVENTION AND VISITORS BUREAU,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER PETITIONER HAS PRESENTED COMPELLING REASONS AS IDENTIFIED BY SUP. CT. R. 10(A) TO GRANT THE PETITION, WHERE THE ISSUES AS FRAMED BY PETITIONER WERE NEVER PRESENTED IN THE DISTRICT OR APPELLATE COURTS AND ARE BASED ON A MISREPRESENTATION OF THE RECORD BY PLAINTIFF WHERE PLAINTIFF AND HER COUNSEL HAD PREVIOUSLY ACKNOWLEDGED THAT THE SONG AT ISSUE WAS JOINTLY AUTHORED BY PLAINTIFF AND FARAG RESULTING IN FARAG HAVING THE AUTHORITY TO LICENSE THE SONG TO RESPONDENT LCCVB THEREBY NECESSITATING ENTRY OF SUMMARY JUDGMENT IN THE DISTRICT COURT CONSISTENT WITH THE LAW PERTAINING TO JOINT AUTHORSHIP OF A SONG?

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A. Petitioner fails to present any conflict in the decision of the Court of Appeals and has not met her burden of demonstrating compelling reasons for the petition to be granted where plaintiff ignores or otherwise misrepresents the record, electing to continue to engage in false and sanctionable accusations of Respondent's counsel. 27

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STATEMENT OF THE CASE

A. Nature of the Case

On October 3, 2003, plaintiff filed a six-count complaint in Federal Court in Michigan against: Henry Farag ("Farag"); his production company, Street Gold Records; and Lake County Convention & Visitors Bureau ("LCCVB") concerning plaintiff's claim of copyright infringement of a promotional song known as "Lake County, Indiana," and five related state law counts. (R 1, ¶ 1.) (R 1; R 11, p. 1.) On March 31, 2005, the case was transferred to the Northern District of Indiana. (R 11, pp. 12-13.)

In 1999, Farag was the manager of a musical group known as Stormy Weather. Janky was one of its members. (R 333, p. 2.) Farag was asked by the CEO of the Respondent LCCVB, Speros Batistatos, if Stormy Weather would like to create a song to represent Lake County for cross-promoting Lake County and Stormy Weather. In the spring of 1999, Farag announced at a rehearsal that LCCVB was looking for a song to represent Lake County. (R 333, p. 2.) Ultimately, Janky and Farag revised a work of Janky's entitled "Wonders of Indiana" to conform with LCCVB's requirements. This song became known as "Lake County, Indiana." *Id.* Janky filed a copyright registration in December 1999 for this derivative song **and signed both her and Farag's names on the form identifying the revised song as a "joint work" and Janky and Farag as "owner[s] of exclusive rights" in the song.** [Emphasis added.] (R 29, Exhibit 2; R 333, p. 2.)

In July 2000, after plaintiff left Stormy Weather, plaintiff refiled the application to correct an error on the December application, but did not remove the authorship attribution to Farag on his ownership rights. Vol. I Trial Transcript, Vol 5, pp. 79-102.

As co-author of the song, and in conjunction with the request by LCCVB, Farag provided a non-exclusive license to LCCVB to use the song. (R 29, pp. 7-8, Exhibit 6,¶ 7.)

On July 21, 2005, LCCVB filed a motion for summary judgment maintaining that plaintiff's claims should be dismissed because plaintiff failed to comply with the notice provisions of the Indiana Tort Claims Act ("ITCA"). Ind. Code § 34-13-3-8. Further, as a joint owner and author of "Lake County, Indiana," Farag was authorized to issue a non-exclusive license to LCCVB for use of the song. Therefore, there was no copyright infringement.

Plaintiff filed no timely response to LCCVB's summary judgment motion. (R 88, pp. 3-4, A 83-108.)

On November 9, 2005, Janky filed a motion for summary judgment. (R 88, p. 4, A 86.) The Court considered it a cross-motion for summary judgment and not a response to LCCVB's Motion for Summary Judgment. (R 88, p. 7, fn. 1, A 89.) The Court granted LCCVB's motion in part dismissing the state counts for plaintiff's failure to comply with ITCA. The Court, however, granted plaintiff partial summary judgment on copyright infringement leaving damages for jury resolution. (R 88, p. 26, A 108.)

The case was tried before a jury from March 12, 2007, through March 16, 2007. (R 225, A 243, R 226, R 227, R 228, R 229.) Janky was awarded $100,000.00 but reduced to setoff the sanctions that had been imposed for Janky's refusal to admit that jurisdiction was never proper in Michigan. (R 333, p. 2.)

On March 29, 2007, LCCVB filed a FRCP 59 Motion for Remittitur, or in the Alternative, New Trial on Damages. (R 247.) The Court denied the Motion. (R 267, A 1-9.)

On June 7, 2007, LCCVB filed its Notice of Appeal to the 7th Circuit from R 267. (R 282-304.)

Janky also filed a cross-appeal involving the $2,500.00 sanction against Janky's attorney, Gregory Reed, pursuant to FRCP 11. The sanction was imposed because Mr. Reed had filed a motion entitled "Motion for Impoundment" where Mr. Reed made the factually bereft claim that Henry Farag and respondent LCCVB had a partnership for the continued sale of the album containing the song which is the subject of this copyright claim. (R 187, Order Granting Motion for Costs and Attorney Fees.) Earlier, while the matter was pending before the Federal District Court in Michigan, plaintiff's counsel made the same argument about a partnership between Farag and LCCVB. Judge Borman of the U.S. District Court for the Eastern District of Michigan previously held that plaintiff "wrongly characterized" the

relationship between LCCVB and Farag as a partnership. (R 13, p. 9, Order Transferring Venue.)[1]

In its appeal to the 7th Circuit, LCCVB raised four issues for review which are set forth below:

I Did the District Court Commit Error Requiring Reversal in Denying Defendant's Motion for Summary Judgment on Plaintiff's Copyright Infringement Claim and Granting Plaintiff Summary Judgment on Infringement, Where Defendant's Motion Was Unopposed and Where the Copyright Application Filed by Plaintiff Identifies the Derivative Song at Issue "Lake County, Indiana" as a Joint Work Authored by Janky and Farag and Where Each Co-owner Has the Right to Use or to License the Use of the Work And, at a Minimum, a Question of Fact Existed as to Coauthorship and Co-ownership?

II Did the District Court Abuse its Discretion by Not Granting Defendant's FRCP 41(b) Motion for Involuntary Dismissal Where Plaintiff Repeatedly Failed to Comply with Court Orders and Deadlines, "Admonished" the Plaintiff for Her Non-compliance Which "May Result in Further Sanctions or Dismissal of Her Action" and Where, Despite this Admonition, the Plaintiff Continued to

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[1] Not to be deterred, plaintiff's counsel Gregory Reed makes the same factually bereft and record-empty contention in this petition. See Plaintiff's Petition, pp. 2, 7 and 14.

Violate Court Deadlines and the Court Even Acknowledged That Plaintiff's Failures to Comply with Court Imposed Deadlines "Impeded LCCVB's Ability to Prepare this Matter for Trial?"

III Where the District Court Failed to Adhere to FRCP 16(e) That Modifications to the Final Pretrial Orders Can Occur Only to Prevent Manifest Injustice, Is Defendant Entitled to a New Trial Because the Stricken Stipulated Facts Materially Changed Defendants' Trial Strategy in Regard to Presentment of Proofs?

IV Did the District Court Commit Error Requiring Reversal When it Denied Defendant's Motion for Remittitur, or in the Alternative, New Trial on Damages.

In an August 3, 2009 opinion, the 7th Circuit resolved the case based on the first issue identified in LCCVB's appeal, finding that Farag and Janky were both joint authors of the work in question. Consequently, as Farag was a joint author of the work, he could license it to LCCVB. (7th Circuit Opinion, pp. 9-13.) Therefore, there was no copyright infringement by LCCVB in its use of the song. The 7th Circuit ordered that summary judgment be entered in favor of LCCVB. (7th Circuit Opinion, p. 14.) In connection with the cross-appeal, the Court found there was no error in imposing Rule 11 sanctions against Mr. Reed. (See 7th Circuit Opinion, pp. 13-14.)

On August 17, 2009, Janky filed a petition for rehearing and petition for rehearing en banc.

On October 2, 2009, the 7th Circuit denied the petition, concluding that "All the judges on the panel had voted to deny a rehearing, and none of the judges in active service have requested a vote on a petition for rehearing en banc." Plaintiff's Appendix, pp. 5, 73a - 74a.

B. Statement of Facts

Before setting out the record evidence relative to petitioner's arguments, it is necessary for respondent to observe that petitioner's statement of the case contains misstatements and omissions as to the facts in the record before the lower courts. Also, petitioner's argument contains unsubstantiated factual allegations that are false, and if not for the otherwise applicable judicial privilege, would form the basis for a libel action.[2] These misrepresentations and omissions will be identified below.

In 1999, Henry Farag was the manager and leader of the musical group Stormy Weather. Janky was one of its members. (R 333, p. 2.)

Farag was asked by the CEO of Respondent Speros Batistatos, about creating a song to represent Lake County that could be used to promote Lake County. Accordingly, Farag announced at a rehearsal one evening in the spring of 1999 that LCCVB was looking for a song to represent Lake County. (R 333, p. 2.) Janky understood that anyone was welcome to write

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[2] As stated in the previous section, one misrepresentation continuing to be propounded by plaintiff's counsel is that there is a partnership between LCCVB and Farag.

the song, including the public at large. (R 178, A 155-154; R 71, Exhibit 8, p. 35.)

Janky and Farag revised a prior copyrighted work of Janky's entitled "Wonders of Indiana" to conform with the requirements of LCCVB. *Id.*[3] Farag participated in the significant revisions of the song that was ultimately accepted by LCCVB. Janky now claims she believed that she was writing the song for LCCVB's use as part of a contest. (R 71, Exhibit 8, pp. 35-36.) Janky incorporated Farag's changes and prepared a new copyright registration for this derivative work dated December 16, 1999. She signed her and Farag's names to a copyright registration (PAU 2-485-026) for the revised song that was used by LCCVB. (R 178, p. 4.) On the copyright registration, Janky gave herself credit for the music and lyrics and identified Farag as a co-author providing "additional lyrics/joint work." (R 29, Exhibit 2; and R 178.) Both are listed on the registration as copyright **claimants and owners of exclusive rights.**[4] *Id.*

Janky recorded the revised song with Stormy Weather at Thunderclap Studios. (R 178, p. 8, A 158.) The recorded acappella song was given to LCCVB for its review. (R 178, p. 8; and R 171, with Exhibit 8, p. 40.) The Thunderclap recording was the only recording of the revised/derivative song that Ms. Janky made. (R 178, p. 8, A 158; R 71, Exhibit 8, p. 49.)

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[3] Plaintiff copyrighted the song "Wonders of Indiana" a/k/a "Indiana" on May 6, 1999. (R 178, p. 4, A, p. 153-4.)

[4] For the 7th Circuit, this acknowledgment by Janky herself was some of the strongest evidence showing intent to create a joint work. (7th Circuit Opinion, pp. 10-11.)

In April 1999, LCCVB recorded a video of Stormy Weather performing the song. No money was offered to the group for the video, all the parties agreeing that "payment" by LCCVB would be by way of promotional consideration of the group in exchange for a nonexclusive license for LCCVB to use the revised song and video. (R 29, p. 2; R 333, p. 3.)

On December 1, 1999, at the grand opening of the LCCVB Visitor's Center, the video containing the song "Lake County, Indiana" was played. (R 333, p. 8.) Janky performed the song live at the opening. (R 11, pp. 72-73, R 248, pp. 2-6.)

The album "Doo-It Doo-Wop" was created by Stormy Weather beginning in January 2000 and completed around June 2000. (R 29.) The jacket cover for the album lists Cheryl DeRosier (a/k/a Cheryl Janky) and Farag as co-authors of the song with Farag Music BMI as the publisher of the song. (R 29, p. 2.) (Janky left Stormy Weather prior to the release of the album). Janky claimed she never gave consent for the use of her song on the "Doo-It Doo-Wop" album. (R 71, p. 138; R 178, p. 9, A 158.) Farag testified that as a co-owner of the revised song, he issued a non-exclusive license to LCCVB to use the song. (R 71, Exhibit 6, ¶¶ 6-11; R 178, p. 6, A 158.)

Farag declared that during the creation of the sound recording for "Lake County, Indiana," significant changes were made, in the lyrics and melody from what was originally presented by Janky, with changes made throughout the recording process. (R 132, Exhibit 1, ¶¶ 9, 11.)

LCCVB purchased 1000 CD's and 500 cassettes of the Doo-It Doo-Wop Album, copyrighted 2000. Of the approximately 15 songs on the album, one was the song at issue. (R 71, Exhibits 4, 7, R 333, p. 3.)[5] There was no other payment. *Id.* LCCVB sold them at the Welcome Center located in Hammond, Indiana. (R 71, with Exhibits. 4, 7.)

On August 7, 2002, Janky and other former members of Stormy Weather pitched a new song to LCCVB sung by Janky as a replacement for the song "Lake County, Indiana." (R 132, p. 9, Exhibit. 4.) LCCVB declined. (*Id.*)

In a June 13, 2003 letter sent to the LCCVB and its then CEO, James Tsismanakis, counsel for Janky, Mr. Reed, stated in part:

> We must inform you that our client, publisher and **co-writer** Cheryl Janky, retains all publishing, licensing, control rights to this song and has not authorized nor consented to the license for sale of this song. [Emphasis added.]

(R 132, p. 11, Exhibit 5.)[6]

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[5] Janky conceded that she received royalty checks from Street Gold Records, Henry Farag's sole proprietorship, for the sales of the album, but never cashed any of the checks claiming that they were not of sufficient value to reflect her work on the album and particularly the song "Lake County, Indiana." (R 71, Exhibit 8, pp. 73-74.) Again, petitioner distorts the record when she states she was not paid for the song . (See Petition, p. 7.)

[6] Hence, contrary to plaintiff's counsel's baseless accusation that LCCVB, through its counsel, misrepresented the truth by "falsely

C. Litigation History

October 3, 2003, plaintiff filed her complaint alleging copyright infringement and five state law claims in the Federal Court in Michigan. (R 1.) Janky alleged that LCCVB engaged in the unauthorized use of two songs, "Wonders of Indiana" and "Christmas Lullaby."[7] (R 1, ¶¶ 14, 18, 25.) Plaintiff claimed that the "Wonders of Indiana," song was written by Janky in response to Farag's solicitation for a song which was recorded as a song for a contest. (R 1, ¶ 14.)

Janky also claimed in her complaint that Farag represented himself as a sole copyright owner of the "Wonders of Indiana" song in his contractual relationship with LCCVB. (R 1,¶ 21.)

On or about January 7, 2004, Farag filed his answer to plaintiff's complaint, affirmative defenses, and counterclaims against Janky. (R 4, Answer and Counterclaim.) In his affirmative defenses, Farag stated that plaintiff's claims were barred because "plaintiff claims copyright to work that did not belong to plaintiff' and "plaintiff lacks standing to assert claims for each claimed copyright." (R 4, Affirmative Defenses 8 and 9.) In the counterclaim, Farag states that "Cheryl Janky has also sought copyrights on 'Lake County, Indiana' without advising the *co-writer* Henry Farag." [Italics added.] (R 4, Counterclaim,

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asserting that Janky was a joint author," Mr. Reed's own correspondence "falsely" asserts the same thing.

[7] As it turned out, the allegation regarding "Christmas Lullaby" was false.

¶ 1.)[8] The counterclaim also included infringement of Farag's trademarks, unjust enrichment, use of trade secrets, and other "deceptive practices." (R 4, Counterclaim, ¶¶ 4, 5, and 8.)

On June 21, 2004, LCCVB issued its requests for admission on jurisdiction. (R 125.) On June 18, 2004, Plaintiff denied that jurisdiction was not proper in Michigan. (R 125.) LCCVB moved for summary judgment on jurisdiction on July 16, 2004. *Id.* In the court's order finding that jurisdiction was not proper over LCCVB in Michigan and transferring the matter to Indiana, the court rejected plaintiff's contention that there was a partnership between LCCVB and Farag to nationally distribute the Doo It Doo Wop Album. (R 11, pp. 9-10.) In fact, the court observed that: "Plaintiff wrongly characterizes the 'partnership' referred to by defendant Farag in his deposition. The Court finds that defendant Farag uses the term 'partner' in reference to the agreement to record the song and not as plaintiff suggests" [to market the Doo It Doo Wop Album nationally]. (R11, pp. 9-10.)[9]

On July 21, 2005, LCCVB filed its motion for summary judgment. (R 29.) LCCVB argued that Janky failed to comply with ITCA notice provisions, Indiana Code, § 34-13-3-8. LCCVB also argued that as a joint owner and author in the copyright of "Lake County, Indiana," Farag was authorized to provide

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[8] In Plaintiff's petition, plaintiff fails to acknowledge that the counterclaim identifies Henry Farag as a co-writer of the song.

[9] Plaintiff's Petition again asserts that Farag and LCCVB were partners despite the evidence to the contrary. (See Petition, pp. 2, 6, 14, and 16.)

LCCVB a non-exclusive license to play the song, "Lake County, Indiana" pursuant to 17 U.S.C. § 201(a).[10] *Id.*

On August 10, 2005, Janky filed an amended complaint. LCCVB objected. (R 88, p. 3, A 85.) Among the reasons for the objection was that the amended complaint was filed past the amendment cut-off date. (R 39.) Prior to LCCVB receiving a copy of the proposed amended complaint, defendant learned that an amended complaint had already been filed with the court. Plaintiff was attempting to amend a prior factual statement in addition to amending the case caption. Plaintiff was attempting to change ¶ 16 by subterfuge, identifying Janky as a 90% owner of the lyrics as opposed to an 80% owner which was in the original complaint. *Id.*, p. 2.[11]

On September 9, 2005, Janky filed a motion for leave to file an amended complaint and a motion to strike LCCVB's summary judgment motion. (R 88, p. 3; A 85.) On September 19, 2005, LCCVB filed its response to both motions. (R88, A 85.) *Id.* In response to the motion for leave to file an amended complaint, LCCVB maintained that it was past the amendment cutoff date and was futile.

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[10] Cheryl Janky admitted in a declaration that Farag had, at a minimum, 10% interest in the copyright even though the copyright filing did not disclose or attribute percentage of ownership. (R 29, Exhibit 1 and Exhibit 2.)

[11] Farag's potential liability was ultimately discharged in bankruptcy and he was dismissed from this case. (R 88, p. 2, A 84.)

On September 12, 2005, the court ordered that the August 10, 2005, amended complaint be stricken.

On October 21, 2005, plaintiff filed a motion for leave to file a second amended complaint and a motion for an extension of time to file a response to LCCVB's summary judgment motion. (R 88, p. 3, A 85.) Plaintiff claimed that the extension was requested, "due to the oppressive tactics by defendants [sic] and their counsel's unreasonable request and improper filing of matter [sic], but not limited to other inappropriate tactics by defendants' [sic] counsel conduct which has expanded and interrupted the plaintiff's responsive brief." (R 53, ¶ 1.) Although plaintiff did not reference or file any evidence to support the allegation in ¶ 1, plaintiff alleged that, "defendants' [sic] counsels have filed a stipulation on May 2, 2005, that a motion for summary judgment was premature until the completion of discovery." (R 53, p. 2, ¶ 2.) As an alternate excuse, plaintiff alleged that one of the two attorneys representing her, Stephanie Hammonds, "had been under doctor care for a substantial period of time, at which time she was able [sic] to work for a series of weeks respectively around the time of the filing of Defendant Lake County's motion for summary judgment [in July of 2005]." *Id.*, p. 2. Plaintiff's counsel asserted that, "[T]he overload in addressing various matters in this case, absent the support of co-counsel, has disable [sic] the lead counsel, Gregory Reed, and has adversely hindered opportunity to reasonably respond within the required period to all outstanding matters." *Id.*[12]

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[12] Plaintiff never articulated any of these "outstanding matters."

On October 27, 2005, the court denied the motion to strike LCCVB's summary judgment motion, denied the motion for extension of time to file a response to LCCVB's summary judgment motion and ordered that the untimely response to the motion for summary judgment be stricken. (R 88, pp. 3-4, A 85-86.)[13]

On November 8, 2005, LCCVB filed a FRCP 41(b) motion to dismiss for lack of prosecution. (R 61.)

On November 9, 2005, plaintiff filed her summary judgment motion. (R 63; and R 64.) Plaintiff contended that the song was not a "joint work" because Farag's contribution was "de minimus." According to plaintiff, it was her "gratuitous nature to give credit for revised lyrics by inserting defendant Farag's name on the copyright registration form" and it was not her intent for it to be a joint work. (R 64, p. 7, Exhibit E-2.)

Janky claimed that "I now understand that the proper way to give a 'thank you' for any de minimis contribution is to give acknowledgment on the album credits and/or liner notes." (R 63, Exhibit 2, p. 6.)[14]

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[13] Under N.D. Ind. L. R. 56.1(a), the response to a motion for summary judgment is due within 30 days from the date the motion is served.

[14] In a November 9, 2005, Declaration Janky declared that her "intent" in including Farag on the December 16, 1999, copyright registration of the revised song was to indicate her "gratitude," designate credit for his ideas, and to demonstrate that she "appreciated every little bit of support, which is hard to obtain in this industry." (R 63, Exhibit 2, Janky Declaration, ¶ 6; and R 178, p. 4, A 154.)

Janky further asserted, "I never intended for Farag to acquire any copyright ownership interest in the song, "Wonders of Indiana" a/k/a "Indiana" and I did not consider him to be a co-author of this song." (R 63, Exhibit 2, ¶ 7; and, R 178, p. 5, A 155.)[15]

LCCVB responded noting Plaintiff admitted in both her affidavit and deposition testimony that LCCVB's use of the song was authorized by the "co-author of the song, defendant Henry Farag." (R 71, Exhibit A.) In her deposition, Janky conceded Farag had the exclusive distribution rights of the album containing the song. (R 71, Exhibit 8, pp. 147-148.)

Farag declared that he provided LCCVB a non-exclusive license to play the song "Lake County, Indiana" at the Visitors Bureau. (R 71, Exhibit 6,¶ 6.) In exchange for this nonexclusive license, Stormy Weather received publicity/marketing, and no fees were paid. (R 71, Exhibit 6, ¶ 7.)[16]

On March 29, 2006, the Court issued its opinion on the cross motions.

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[15] The 7th Circuit gave this affidavit "little weight" in light of the earlier (pre-suit) copyright registration. (7th Circuit Opinion, p. 11.)

[16] Despite plaintiff's arguments in her summary judgment motion, plaintiff testified that it was her intent to give Farag credit as joint composer of the lyrics. (R 71, Exhibit 8, pp. 39-40, 61-62, 64-66, 68-70.)

The Court acknowledged LCCVB's motion was unopposed because of Janky's untimely response. (R 88, p. 7, fn. 1, A 89.)[17]

The Court concluded that partial summary judgment should be granted in favor of plaintiff for copyright infringement because the court found no joint authorship. (R 88, p. 15, A 97.)

Joint authorship is a two-part test requiring that the parties (1) intended to be joint authors at the time the work was created and (2) the party must show that its contributions to the work were "independently copyrightable." *Id.* The trial court held that based on Janky's declaration filed six years after the filing of the December 9, 1999, copyright, it was not her intent to grant Farag joint authorship. (R 88, pp. 15-16, A 97-98.) The trial court also based its decision in part on the allegation in Farag's counterclaim that denied he gave her permission to include his name on the registration because Farag believed the song to be a work for hire for LCCVB. (R 88, pp. 15-16.) The Court rejected LCCVB's argument that Janky's position was belied by her December 19, 1999, copyright registration form and the ASCAP registration showing joint ownership. *Id.* Finally, the Court concluded that Janky's assertion that Farag's 10% revision of the lyrics (although never establishing what lyrics were revised) rendered Farag's contribution not independently copyrightable. (R 88, p. 19, A 101.)

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[17] Under FRCP 56(e)(2), the opposing party is obligated to respond to a motion for summary judgment and "if the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."

Inexplicitly, however, the Court held, "Consequently, LCCVB has not demonstrated joint authorship, and thus has not refuted *the prima facie evidence of the validity of Ms. Janky's copyright; Ms. Janky remains entitled to the presumption that her copyright is valid.*" (R 88, p. 19, A 101.) Consequently, because Farag was found not to be a joint author, he had no authority to grant LCCVB a license to use the revised derivative song. *Id.* (R 88, p. 21, A 103.) The Court granted LCCVB summary judgment on the remaining state law claims because of noncompliance with ITCA. (R 88, p. 25, A 107.)

On March 29, 2006, the Court denied LCCVB's motion for dismissal under FRCP 41(b). The Court, concluded: "However, the Court now **ADMONISHES** the plaintiff, Cheryl Janky, that further failure to comply with Court-ordered deadlines may result in further sanctions or dismissal of her action." (R 89, p. 5, A 113.)

On June 1, 2006, the Court also limited Janky's evidence at trial, because plaintiff failed to disclose any potential witnesses pursuant to FRCP 26(a), and she was in violation of the Court's scheduling order requiring her to provide her portions of the proposed pretrial order to LCCVB by May 1, 2006. (R 123, pp. 2-4.) The Court went through a review of all the violations of court orders and deadlines:

> On March 29, 2006, in denying LCCVB's Rule 41.1 Motion to Dismiss, the Court admonished Ms. Janky that any further failure to comply with Court-ordered deadlines may result in further sanctions or dismissal of her action.

> Ms. Janky has not disclosed any potential witnesses pursuant to Rule 26(a)(1) and has not disclosed any witnesses through discovery devices (interrogatories, requests for production of documents). Ms. Janky violated the Courts' October 27, 2005 Scheduling Order, which required her to provide LCCVB with her portions of the proposed pretrial order by May 1, 2006. LCCVB timely filed the proposed pretrial order by the May 18, 2006 deadline without the benefit of Ms. Janky's portion. Ms. Janky belatedly filed a proposed pretrial order on May 19, 2006, moments before the final pretrial conference, and then filed a corrected proposed pretrial order on May 22, 2006. **These failures have impeded LCCVB's ability to prepare this matter for trial.** [Emphasis added.]

(R 123, p. 4.)

On June 7, 2006, LCCVB filed a motion for reconsideration of the summary judgment order. (R 132).

On June 7, 2006, LCCVB also filed a motion to dismiss the case again based on FRCP 41(b) where plaintiff, as part of her trial brief (filed on June 5, 2006, R 124), issued 10 subpoenas to various entities pertaining to phone records, internet broadcasting, advertisements, etc. (R 135, Renewed 41(b) Motion, p. 3.) This violated the order restricting plaintiff to limited witnesses and documents and the 10 subpoenas were issued well-beyond the close of discovery. (R 135.)

On June 7, 2006, the Court denied defendant's second 41(b) motion. (R 136, a 438-452.) In its order, the Court acknowledged that Janky, "[s]eeks this new discovery [issuance of the 10 subpoenas] by subpoena long after the close of discovery, [and] despite the Court's ruling limiting the scope of documentary evidence and witnesses that Ms. Janky will be permitted to attempt to introduce or call to testify at trial," and denied use of this untimely discovery. (R 136, p. 2. A-451-452.)

On June 30, 2006, plaintiff filed a motion to add Speros Batistatos. (R 155.) On July 4, 2006, plaintiff filed a motion to "add key board officers." (R 158.)

On September 22, 2006, the Court denied plaintiff's motions to add Batistatos and key board officers as untimely. (R 180, p. 3.) The Court concluded: "In light of [] Ms. Janky's failure to show good cause pursuant to FRCP 16 and given the Court's multiple prior admonitions of Ms. Janky for failure to comply with court-ordered deadlines, both motions are denied as untimely." (R 180, p. 3.)

On September 22, 2006, the Court issued its order granting in part and denying in part LCCVB's motion for reconsideration (R 178):

> Upon further consideration of the evidence that was offered in support of and in response to summary judgment on the issue of joint authorship that controverts the substance of her declaration, the Court reconsiders its earlier finding that no joint authorship based on the intent prong of the test. The Court now finds

> that there is a genuine issue of material fact as to the intent requirement for joint authorship.

(R 178, pp. 18-19, A 168-169.)

Nevertheless, the Court reaffirmed summary judgment on copyright infringement holding that Farag's contribution, "is not 'independently copyrightable' mandating the entry of summary judgment in favor of Ms. Janky on the issue of joint authorship,"despite never being shown who wrote which lyrics or melody. (R 178, p. 20, A 170.) The Court held that Janky's declaration that Farag's contribution was 10 percent was insufficient to be independently copyrightable. (R 178, pp. 21-22, A 1171-172.)[18]

On February 7, 2008, plaintiff reviewed the proposed pretrial order, including stipulated facts. Plaintiff had no changes to the 29 stipulated facts. Accordingly, the pretrial order was filed on February 8, 2007. (R 199, A 199.)

On February 9, 2007, the Court held the final pretrial conference. While plaintiff objected to portions of the pretrial order, there was no objection regarding any of the stipulated facts.

On March 12, 2007, the jury trial commenced. After the Court provided the parties the final pretrial order which had all of the stipulated facts except one,

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[18] In her deposition, plaintiff stated that Farag provided her with additional lyrics prior to recording the demo for LCCVB. (R 71, Exhibit 8, pp. 42, 141.)

plaintiff's counsel objected arguing that they did not have enough time to review the stipulated facts even though plaintiff's counsel sent an e-mail communication agreeing to the stipulated facts on February 7, 2007. (R 345, pp. 11-16, A 345-350.) The Court, giving plaintiff counsel the "benefit of the doubt," struck 10 stipulated facts." (*Id.*)

The case was tried from March 12, 2007, through March 16, 2007. During the trial, extensive testimony was obtained from Janky and Farag demonstrating there were significant lyrical and melodic changes to "Wonders of Indiana" as reflected in the December 1999 copyright registration for the revised song. (R 349, pp. 64-78, A 367-371; R 350, pp. 11-18, A 453-470.)

Mr. Farag testified about his contributions to the creation of the song at issue:

> Q. And did anyone, including Cheryl Janky, ever ask from you for there to be a writing memorializing this agreement that you negotiated on behalf of Stormy Weather with the bureau?
>
> A. No.
>
> * * *
>
> A. Yes. I told the group and Cheryl specifically the lyrics had to be specific as to Lake County and different phrases had to be changed and --

Q. Approximately how many meetings, if you recall, or rehearsals would there have been to go over the changes either as a group or changes you were making yourself before you ever ended up at Thunderclap studios to record this?

A. I believe maybe two.

Q. Outside of Thunderclap?

A. Outside of Thunderclap. And I'm really not even sure. It could have been one or two, because I was even rewriting lyrics at the studio.

* * *

BY MR. JORDAN:

Q. Mr. Farag, I would ask that you take a look at these and scan them, and then I'll be putting them on the prompter that will show on your monitor here (indicating) so that we can go over them together.

A. Yes, I see them.

Q. You recognize those?

A. Yes.

* * *

Q. Mr. Farag, is that large enough for you to be able to read from there?

A. Yes.

Q. All right. Representing to the Court that on the left where it says, "Wonders of Indiana," that is Exhibit AA. And on the left, we have Exhibit BB, the lyrics that correspond to December, and subsequently, July copyright registration.

Looking at these lyrics, either word by word or line by line, do you see difference, sir?

A. Yes.

Q. How would you characterize the difference? Are they de minimis, are they significant?

A. Significant lyrical changes.

Q. Looking at it, could you describe or pick out a line or two or however many to show for us what you refer to as "significant changes?"

A. Well, the first one was Lake County, Indiana, which would be the way it's sung, the hook, "Lake County, Indiana," (witness singing) that's what most people would remember of this whole song.

Then things like "Chicago's neighboring South Shore family fun, ethnic diversity, Hoosier hospitality, hotels, industry, universities." It is completely rewritten.

* * *

Q. Because the prompter does not allow it, and everyone else has seen it, but I want you to have the alternate bridges, as well, to compare to see if you still believe that the number of changes that exist for the Exhibit BB, the December, July copyrighted version of the song used by Lake County, if you still believe it's significantly different – looking at not only the original lyrics but he possibility of substitution alternate bridges, do you still believe the finished product form December, July is significant?

* * *

A. Yes. I would consider the adapted version a world of difference.

Q. In addition to lyrical changes, were there any other changes to the melody, or harmony, tempo, anything like that?

A. Well, I know that – and I recall this in the studio. The tourism bureau wanted ethnic diversity as one of the tag lines, and it's a very hard thing to sing. So you have to – a lot of syllables. So we had to change it to – a little bit. It was a hard one to sign. It's trying to see which – "hotels and restaurants, put smiles on your faces." You have to run through a lot of that and you have to – just to make sure that we got the corrected tag lines in there and get all the syllables in, some of the melody had to change, too.

Q. Was any of the tempo or harmony, anything else changed?

A. Well, the minute you change one, you have to change another. It's almost like math. The minute you talk about "diversity," for instance, now, it's not just one word. It's three(sic) syllables. Now you have to rhyme that. So now you've got more syllables to deal with, plus a rhyme to go with that, and so it's never just one thing.

* * *

Q. With that understanding, do you still maintain the position that the version used by Lake County is significantly different than that which you were initially presented by Cheryl Janky?

A. Yes."

(A 459-467.)

Despite this testimony, the Court refused to give a requested jury instruction on co-authorship and the rights of co-authors to license a song without the consent of the other co-author in light of its ruling on infringement. (R 352, pp. 8-15, A 437-444.)

The jury returned a verdict of $100,000.00 from which sanctions against plaintiff were setoff. (R 240.)

On March 29, 2007, LCCVB filed a motion for remittitur or in the alternative new trial on damages. (R 248.) The motion was based on plaintiff admitting

at trial that she knew by December 1, 1999, that LCCVB was using the song without her authorization, but did nothing to notify Lake County until 2003. (R 247, p. 2.)

At trial, plaintiff testified that the licensing fee for an original song would be approximately $30,000.00. Hence, the jury verdict of $100,000.00 represents a licensing fee of $30,000.00 per year for the years 1999 through 2001 and, as the plaintiff requested in closing argument, interest. (R 247, pp. 2-3.)

On May 16, 2007, the Court denied LCCVB's motion for remittitur. (R 267.)

LCCVB appealed the jury verdict and plaintiff Janky only cross-appealed the imposition of Rule 11 sanctions against her counsel Gregory Reed.

After full briefing and oral argument, the Court of Appeals issued its opinion on August 3, 2009, reversing the jury verdict and directing that an order of summary judgment be entered in favor of LCCVB as the song at issue was the work of joint authorship. Therefore, Farag had the right to license the song to the LCCVB. Addressing the cross-appeal, the 7th Circuit affirmed the imposition of the sanctions and that the sanctions were payable by Mr. Reed directly to the LCCVB – which have yet to be paid.

REASONS FOR DENYING THE PETITION

PETITIONER HAS PRESENTED NO COMPELLING REASONS AS IDENTIFIED BY SUP. CT. R. 10(A) TO GRANT THE PETITION, WHERE THE ISSUES AS FRAMED BY PETITIONER WERE NEVER PRESENTED IN THE DISTRICT OR APPELLATE COURTS AND ARE BASED ON A MISREPRESENTATION OF THE RECORD BY PLAINTIFF WHERE PLAINTIFF AND HER COUNSEL HAD PREVIOUSLY ACKNOWLEDGED THAT THE SONG AT ISSUE WAS JOINTLY AUTHORED BY PLAINTIFF AND FARAG RESULTING IN FARAG HAVING THE AUTHORITY TO LICENSE THE SONG TO RESPONDENT LCCVB THEREBY NECESSITATING ENTRY OF SUMMARY JUDGMENT IN THE DISTRICT COURT CONSISTENT WITH THE LAW PERTAINING TO JOINT AUTHORSHIP OF A SONG.

A. Petitioner fails to present any conflict in the decision of the Court of Appeals and has not met her burden of demonstrating compelling reasons for the petition to be granted where plaintiff ignores or otherwise misrepresents the record, electing to continue to engage in false and sanctionable accusations of Respondent's counsel.

Although somewhat obdurate, it appears that petitioner's argument for the petition to be granted

consists of the following contentions: (1) the 7th Circuit decision is contrary to other 7th Circuit decisions and the law of the majority of circuits, presumably in regard to what constitutes joint authorship; and, (2) the actual joint author of the work is the CEO of Respondent rather than Farag, despite what petitioner states in her copyright application regarding the song. As will be seen, petitioner has failed to show any compelling reasons for review of her petition. But first, it is necessary to address the bellicose and false accusations contained in plaintiff's document.

Plaintiff asserts, despite being sanctioned in a related case for the identical accusation, that LCCVB "materially misrepresented the truth by falsely asserting false claims as 'work for hire and joint authors' in Court and its pleadings." (Petition, p. 7.) This argument was the subject of plaintiff's claims for attorneys' fees in the District Court matter in this case, which were denied, prompting plaintiff to file a second Federal action attempting to obtain an attorney fee award by making the same accusations. In *Janky v. Speros Batistatos, et al,* USDC – Northern District of Indiana Case No. 2:07-cv-339, (referred to as "Janky 2") Janky filed a complaint against the respondent, its Board of Directors, its CEO, and its attorneys. As articulated by Judge Simon in that matter:

> The complaint was based on claims those defendants asserted when defending an earlier Federal copyright lawsuit also brought by Janky. The main thrust of this second lawsuit was that the defenses used in the first case [the instant matter] were frivolous and groundless. In fact, there was no basis for Janky's second lawsuit, as it had been established in the initial

> litigation that the defenses were grounded in fact and credible evidence, and were held by the judge in that case to not be frivolous. After dismissing the complaint before me, I sua sponte order respondents to show cause why they should be sanctioned for violating Rule 11(b). . . . Because they failed to show that the claims included in the second lawsuit were warranted by existing law or by non-frivolous argument, or that the suit was brought for a proper purpose, sanctions will be imposed.

(See Janky 2, Doc. No. 53, Memorandum Opinion and Order, pp. 1-2.)

Next plaintiff makes the incomprehensible assertion that "All filings by respondent were to mislead the Court with material misstatements that were false and fraudulently asserted," citing to appendix pages which are the opinions of the 7th Circuit and the District Court. Strangely, this reference to the District Court opinion was the same opinion that had granted Janky summary judgment. Not content with that unfounded statement, petitioner feels it necessary to make the following statement that demonstrates that she has chosen to completely ignore the factual record: "There is no evidence before the lower court or the 7th Circuit panel that Farag intended to be a joint owner/author." (See Petition, p. 15.) In order to make this statement, plaintiff has chosen to ignore her own declaration, Farag's declaration, her attorney's correspondence identifying her as a co-writer, her own copyright registration and the trial court's opinion ruling this was a question of fact for the jury. Or, as articulated by the 7th Circuit: "Janky's post-hoc rationalization – that she only

intended to express her gratitude (by identifying Farag as a co-owner and co-author in the copyright registration) is simply at odds with the significant contributions made by Farag and Janky's identification of Farag as a co-author." (See 7th Circuit Opinion, p. 11, Petitioner's Appendix, p. 11-a.)

Petitioner claims that "Respondent's hands are not clean [without any factual support or the ability to divine the meaning of this statement] and that the Court of Appeals' holding [was in error] when there was not any privity with the author Janky and respondent lacked standing in asserting co-authorship for Farag who filed bankruptcy disavowing interest in the song [with cites to the appendix]." However, the cites in the appendix have nothing to do with Farag "disavowing interest" in the song in the bankruptcy proceeding. Nor is it clear what petitioner means that respondent lacks "standing"in asserting co-authorship with Farag where Farag was the one identified as a co-author by Janky herself, and Farag licensed the song to LCCVB for its use.

Turning now to plaintiff's legal argument, it appears that plaintiff is contending that under the copyright statute, 17 U.S.C. § 101 and § 201, and the decision of *Erickson v. Trinity Theater*, 13 F.3d 1061 (1994), that Farag is not a co-author, but rather that Batistatos is the co-author of the song.[19] Plaintiff's arguments are without merit.

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[19] This begs the question that if Batistatos is the actual co-author of the song, then was he not in a position to authorize the use of the song by the LCCVB?

Petitioner maintains that "*Erickson* is the standard" (presumably in regard to the appropriate test for determining whether a work has been prepared as a joint work within the meaning of U.S.C. 17 § 101), but plaintiff provides no analysis of the *Erickson* decision in regard to how the decision in this case conflicts with *Erickson*.

17 U.S.C. § 101, the definitional section of the copyright act, defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into **inseparable or interdependent** parts of a unitary whole." [Emphasis added.] Authors who create a joint work are co-owners of the copyright in that work. 17 U.S.C. § 201(a). Each author has "an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits." See *Erickson, supra,* p. 1065, fn 2.

The 7th Circuit in *Erickson* was confronted with the issue for the first time as to the standard for determining whether a work has been prepared as a joint work within the definitional section of the copyright act. There, the defendant maintained that the standard for determining a joint work was collaboration alone because there was collaboration between the plaintiff author and the actors of the defendant theater company. On the other hand, the plaintiff contended that none of the plays were joint works because she was the only author and the other actors had not contributed independent copyrightable material.

The magistrate judge recommended that a preliminary injunction be entered in favor of Erickson

concerning the plays. The magistrate judge followed primarily the second circuit's test in *Childress v. Taylor,* 945 F.2d 500, 505-506 (2nd Cir. 1991), which found two elements necessary to arrive at joint ownership: (1) The contribution of each joint author must be copyrightable and (2) the parties must have intended to be joint authors. *Erickson, supra,* at pp. 1065-1066.

Both parties filed objections to the magistrate judge's recommendation. The District Court then analyzed the question of joint authorship and examined the two competing tests, namely the *Childress* standard (1) requiring both copyrightability and intent to be joint authors; and, (2) the "collaboration test" with the major difference between the approaches being that the latter does not require each of the claimed joint author's contributions to be independently copyrightable. *Id.,* p. 1067.

The District Court did not choose between the two alternatives, instead finding that under either standard, the plaintiff was likely to prevail on the merits. As to the collaboration test, if it were the correct standard, the District Court concluded that there would need to be a "de minimus collaboration." Accordingly, the District Court found that because the actors' contributions were less than de minimus, the defendant could not prevail.

On review to the Court of Appeals, the Court noted that under the copyright statute, 17 U.S.C. § 201, joint authors hold undivided interest in a work despite any differences in each authors' contribution such that each author as co-owner has the right to use or to license the use of the work subject to an accounting to

the other co-owners for any profits. *Id.*, at p. 1068, citing the *Childress* decision, supra. Further, as observed by the 7th Circuit, "[t]hus, even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit." *Id.*, at p. 1068. The 7th Circuit also cited to 17 U.S.C. § 101 defining a joint work as a work prepared by two or more authors *"with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."* [Italics added.] The 7th Circuit emphasized this point by citing to *Childress* stating that: "We believe that the statutory language clearly requires that each author intended their respective contributions be merged into a unitary whole." *Erickson*, at p. 1068-1069.

Turning to the test to evaluate the contributions of authors claiming joint authorship status, the *Erickson* Court acknowledged the de minimus test of Professor Nimmer and the copyrightability subject matter test of Professor Goldstein. In analyzing the two tests, the *Erickson* Court stated: "The de minimus test requires that only the combined product of joint efforts be copyrightable. By contrast, Professor Goldstein's copyrightability test requires that each authors contribution be copyrightable." *Erickson*, at p. 1069. As further analyzed by the Court, the major difference between the two tests is to preclude the ability to copyright ideas. *Erickson*, at p. 1071. Given this requirement, Professor Nimmer's de minimus test, according to the Appeals Court, is an inadequate judicial tool to ascertain joint authorship. *Id.*, at p. 1070.

The *Erickson* Court gave an example of why the de minimus test was impractical using the example

provided by Professor Nimmer himself who asserted that if the two authors collaborate, with one contributing only *uncopyrightable plot ideas* and another incorporating those *ideas* into a completed literary composition, the two authors should be regarded as joint authors of the resulting work. *Id.*, at 1070. In contrast, Professor Goldstein's copyrightability requirement is consistent with the language of the Copyright Act itself. As noted by *Erickson*, the copyrightability test has been adopted by the majority of the courts that have considered the issue. *Id.*, at 1070. Under this test, "To qualify as an author, one must supply more than mere direction or ideas, an author is 'the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.'" See *Erickson*, at p. 1071.

In reaching its holding, the 7th Circuit stated: "The copyrightable subject matter test does not suffer from the same infirmities as Professor Nimmer's de minimus test. The copyrightability test advances creativity in science and art by allowing for the unhindered exchange of ideas and protects authorship rights in a consistent and predictable manner. *It excludes contributions such as ideas which are not protected under the Copyright Act.* 17 U.S.C. § 102(b)." [Italics added.] *Erickson*, at p. 1071. Therefore, under the majority copyrightability test as adopted by the 7th Circuit, there are two elements:

1. The parties must have intended to be joint authors at the time the work was created; and,

2. The party claiming joint authorship must show that its contributions to the work was "independently copyrightable."

In applying the standard to the facts in *Erickson*, the 7th Circuit found that as to two of the works, Much Ado and Prairie Voices, the Defendant could not show that the parties intended to be joint authors. First, it was conceded by the Defendant that it was Ms. Erickson's decision alone regarding what, if any, contributions the defendant were to be included in the play. Second, the actors, as represented by the Defendant, did not consider themselves to be joint authors with Ms. Erickson.

The contrary exists in this case. Most significantly, Janky herself identified Farag as a co-author in the copyright registration and as an owner of exclusive rights in the song. Even Janky's counsel identified her as a "co-writer" in his first letter to the LCCVB in regard so the song at issue. Janky's affidavit, (which was termed by the 7th Circuit as a "post-hoc rationalization" as to why she identified Farag as a co-author), demonstrates that at the time of the copyright registration, the inclusion of Farag as a co-author and owner of exclusive rights in the song established the intent element of the copyrightability test. Indeed, the *Erickson* Court observed that in the Second Circuit decision of *Childress*, the Court acknowledged that "billing or credit" may be evidence of intent to create a joint work.

Turning to the second element of the test for joint authorship, the Court in *Erickson* found that this test could not be meant for any of the works in question because, "The actors, on the whole, could not identify

specific contributions that they had made to Ms. Erickson's works. . . . Ideas, refinements, and suggestions, standing alone are not the subject of copyrights." *Erickson,* at 1072-1073.

Conversely, in this matter, Farag's contributions "went beyond general 'ideas, refinements, and suggestions.'" See 7th Circuit Opinion, Plaintiff's Appendix p. 11a. As the testimony at trial revealed, the changes, even if they amounted to only 10% of the lyrics were significant, "They were important not only to the final sound, but also to its commercial viability." *Id.* Or, in other words, "even a person whose contribution is relatively minor, if accorded joint authorship status, enjoys a significant benefit." *Erickson,* p. 1068.

In sum, the Court of appeals decision in this matter is consistent with the *Erickson* decision and the majority of circuits that have adopted the copyrightability test as articulated by *Erickson.* The petitioner, therefore, has not met her burden pursuant to Sup. Ct. R. 10 demonstrating any "compelling reasons" for the petition to be granted by this Court.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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